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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DALE LEE HERRING,

Defendant and Appellant.

A104624

**(Sonoma County
Super. Ct. No. SCR31472)**

Dale Lee Herring (Herring) appeals from a judgment of conviction and sentence entered after a jury found him guilty of rape, attempted forcible sodomy, assault by means of force likely to produce great bodily injury, and false imprisonment. He contends: (1) hearsay statements were admitted into evidence in violation of his Sixth Amendment rights under *Crawford v. Washington* (2004) 124 S.Ct. 1354 (*Crawford*); (2) the prosecutor committed prejudicial misconduct in closing argument; and (3) the imposition of an upper term of sentence and consecutive terms violated the Sixth Amendment under *Blakely v. Washington* (2004) 124 S.Ct. 2531 (*Blakely*).

We agree that the admission of certain hearsay statements of the victim violated Herring's Sixth Amendment right to confront and cross-examine adverse witnesses. Because this constitutional violation was not harmless beyond a reasonable doubt, we reverse the judgment.

I. FACTS AND PROCEDURAL HISTORY

After complaining of a sexual assault and beating at the hands of her boyfriend Herring, victim Kim was found dead in her bathtub.¹ Herring was charged with rape (Pen. Code, § 261, subd. (a)(2)), two counts of sexual penetration (§ 289, subd. (a)(1)), attempted forcible sodomy (§§ 664/286, subd. (c)(2)), forcible oral copulation (§ 288a, subd. (c)(2)), making criminal threats (§ 422), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), false imprisonment by violence (§ 236), and attempted murder (§§ 664/187, subd. (a)).² The information also alleged with respect to count VII (§ 245, subd. (a)(1)), that Herring inflicted great bodily injury within the meaning of section 12022.7, subdivision (e).

A. PRETRIAL EVIDENTIARY MOTION

The People disclosed in the information their intention to introduce evidence pursuant to Evidence Code section 1370, with respect to counts I, IV, VII, and VIII (the charges of which Herring was ultimately convicted). In essence, Evidence Code section 1370 provides a hearsay exception under certain circumstances for a victim's statements to police or medical personnel concerning her physical injuries. Defense counsel moved in limine to exclude Kim's out-of-court statements, on the ground that the prosecutor had failed to comply with the procedural requisites of Evidence Code section 1370. The trial court denied the motion, and the matter proceeded to trial before a jury.

B. THE PEOPLE'S EVIDENCE

Herring, a pharmacist at a Rite-Aid store in Rohnert Park, began dating Kim in or around January 2002. That month, and twice in March 2002, Herring filled a prescription for Kim for Duragesic, which is a pain killer also known as Fentanyl.

¹ To protect their privacy, the victim Kim, her siblings Richard and Mary, and her mother and stepfather, Carolyn and Harold, are referred to by their first names.

² Except where otherwise indicated, all references are to the Penal Code.

1. Background Events

Herring believed that Kim was suffering from cancer. Sometime in the spring of 2002, Herring took her to see his friend Kevin Walker, a pharmacist who specialized in herbal and alternative medicine. Herring told Walker that Kim had terminal cancer. Walker examined her and offered advice about medicines.

In March 2002, Kim convinced Herring to pay for her trip to a renowned cancer treatment center at M.D. Anderson Hospital in Houston. In actuality, she used the money to go on a cruise with her brother Richard.

On April 15, 2002, Herring took Kim to see her physician, Dr. Erik Schten, in regard to an ulcer and skin infection on her foot. Dr. Schten treated Kim and referred her to a podiatrist for further treatment. Herring passed Dr. Schten a note, advising that Kim had brain cancer. The news startled Dr. Schten, who had treated Kim since February 2002 for chronic pain from multiple abdominal surgeries and endometriosis. He ordered CAT scans and asked Kim to provide him with the medical records from M.D. Anderson Hospital.

The following day (April 16), Kim returned to Dr. Schten's office alone. Kim instructed Dr. Schten's nurse not to discuss her medical condition with Herring, and told Dr. Schten not to share her medical information with her parents either.

Kim further advised Dr. Schten that, after she and Herring left his office the day before, she told Herring she wanted to end their relationship. Herring became angry and burned her with matches. In addition, Kim reported, Herring had forced intercourse with her a week earlier and had beat her in the past. She said she believed Herring was drugging her and stole her medications. Dr. Schten observed and photographed injuries on Kim's body—including an abrasion on her nose, burns on her forearms, and bruises on her upper thigh—which he had not seen the previous day. Dr. Schten notified the Rohnert Park police, gave Kim their telephone number, and told her the police expected her to file a report.

On May 2 and 10, 2002, Kim telephoned the California Board of Pharmacy Consumer Affairs and spoke to Anna Lopez. Kim told Lopez she was in a relationship

with pharmacist Herring, and she feared for her safety but was unable to end the relationship. Lopez advised Kim to call the police.

On May 31, 2002, San Rafael Police Officer Jill Cingolani went to the San Rafael home of Kim's mother Carolyn and her step-father Harold, in response to threats allegedly made by Herring to kill them.³ Harold told Officer Cingolani that Kim was mentally unstable, had a history of lying, and had been involved in similar claims of threats in the past. Cingolani contacted Herring, who denied making any threats, appeared shocked at the accusation, and said Kim had cancer and psychological problems.

Herring called Kim's mother twice in late May or early June 2002. In the first call, he denied threatening Kim or her parents. In one of the calls, he expressed his understanding that Kim had terminal brain cancer and stated he had given her money to go to Houston for treatment. Carolyn revealed that Kim had not received treatment in Houston but had gone on a cruise to Mexico with her brother. Herring sounded "completely surprised" and asked if Kim was a "con artist." Carolyn disclosed that Kim "lives in a lot of fantasy." In the second call, Herring told her that Kim would "have to pay" or "make restitution" for taking the cruise and telling him she was going to Houston for medical reasons. His voice was cold, threatening, and menacing.

When questioned by her mother, Kim admitted misleading Herring about the cruise, explaining she was afraid of him and wanted to get away to think about their relationship.

According to Carolyn, Kim was immature and lived at times "in a fantasy world." She had accused a number of other people of sexually improper or assaultive behavior in the past. Kim had also mentioned she was grateful Herring had helped her financially and could not believe someone could care for her so much.

³ Kim had called her sister Mary, and Mary called their mother Carolyn, about these threats. It is not entirely clear how Officer Cingolani became aware of it.

On June 5, 2002, Rohnert Police Officer Sheryl Hetrick responded to Kim's apartment. Kim told Hetrick that she wanted Herring removed from the apartment, because of his threats against her and her family. Hetrick observed Herring sleeping on the couch and asked him to leave. Herring complied. Within an hour later, Herring appeared at the police department and attempted to file a fraud complaint against Kim in regard to his paying for her cruise. That same date, Kim informed Dr. Schten that she was going to obtain a restraining order against Herring.

In early or mid-June 2002, Kim accompanied her mother and stepfather to Oregon. While there, Kim received a telephone call from Herring. Kim's mother overheard Kim tell Herring: "Dale, if you try to take my car, I will turn you in to the Pharmacy Board." Kim and her family returned from Oregon on June 16.

On July 2, 2002, Kim told Dr. Schten that Herring stalked her while she was out of town. Three days later, Kim's sister Mary received a telephone call from Herring, who reported that Kim was injecting Fentanyl, an opiate derivative. Herring said he still loved Kim in spite of it all.

2. The 911 Call on July 6

Around 9:30 pm on July 6, 2002, Kim's neighbor Margaret Conteh saw Kim climbing out of her apartment window in her nightgown. Kim asked her to call the police. Kim knocked on the door of another neighbor, Ben Leavitt. According to Leavitt, Kim had blood on her face, appeared in shock, and said she had been beaten by her boyfriend. Leavitt called 911.

3. Kim's July 6 Statement to Officer Boggeri at the Scene

Around 9:30 p.m. on July 6, 2002, Rohnert Park Police Officers Hetrick and Steve Boggeri responded to Kim's apartment. According to Boggeri, Kim was "very frightened, visibly shaken, emotional." He witnessed abrasions on her left cheek, face, and shoulders; a cut inside her lip with dried blood around her lips; a large bruise under her right jaw; redness across her neck; and scrapes on both knees. Hetrick also noticed that Kim was "visibly upset" and her hands were shaking. She observed red and purple marks on Kim's face, bruises on her arms and legs, and a mark on her shoulder

resembling a human bite mark. Her lips were swollen and caked with dried blood. Kim's dress had blood on it.

At the scene, Boggeri asked Kim how she sustained her injuries. She responded that her upper body injuries came from an altercation with her boyfriend, Herring. She thought she injured her knees when she jumped out her apartment window to get away from him. Kim then explained to Boggeri that Herring had punched her several times, placed a pillow over her face to suffocate her, and choked her to the point she could not breathe. Boggeri photographed Kim's injuries, and the photos were admitted into evidence and shown to the jury.

4. Kim's July 6 Statement to Paramedic Westrope at the Scene

Paramedic Scott Westrope responded to Kim's apartment the night of July 6. He saw that Kim's clothes were torn and she had injuries around her lips, abrasions on the side of her neck, and cuts on her knees and shoulders. Kim appeared anxious and nervous. She said that her ex-boyfriend had hit her with his closed and open hand. To escape, she jumped out the window, injuring her knees and shoulders. She also said he had grasped her neck and tried to strangle her. Kim was transported to Petaluma Valley Hospital.

5. Kim's July 6 Statement to Officer Hetrick at the Hospital

Officer Hetrick accompanied Kim to the Hospital. While Kim awaited treatment, the officer obtained a more detailed statement from her concerning the events of July 6 and a purported rape on July 5.

According to Hetrick's testimony, Kim said she had returned to her apartment after several hours out on July 6, 2002. She told Herring she had been to the supermarket, but he accused her of being with a "black man." Herring grabbed and shook her, pushed her to the floor, punched her face and back, and pushed her face into the couch. Kim tried to dial 911. Herring grabbed the phone and threw it across the room. As he dragged her toward the bedroom, Kim screamed: "Somebody please help me. He's going to kill me." Kim claimed she had to go to the bathroom, and he told her to "go in [her] pants." He threw Kim onto the bed, pinned her arms down with his knees,

and threatened: “You’re going to die tonight. I’m going to kill you, and I’m going to kill your brother.” She screamed, and he put a pillow over her face and punched her through the pillow. Kim saw her blood on the pillow and screamed again. He put his hands around her throat and started to choke her. He said, “You know, I like this.” He also said, “I’m going to light you on fire.” She got up and used the closet door as a shield. Herring pushed the door aside and bit her on the left shoulder. She bit his hand in retaliation. She told Herring she was going to call the police, and he told her to go ahead because no one would believe her since he was the one with blood on his shirt. Kim jumped through a set of blinds out the first floor window and ran to several different apartments, banging on doors and screaming for help.

Officer Hetrick then asked Kim whether Herring had abused her on prior occasions. Kim paused, started to cry, and responded that he had raped her the night before (July 5).

According to Officer Hetrick, Kim recounted that on the evening of July 5, she had showered and dressed for bed. Herring followed her into the bedroom and said, “I want you to be my whore. I want you to be my slut.” He threw her down on the bed. She screamed and said, “No. I don’t want this.” Herring grabbed her by the hair and forced his penis into her mouth. She gagged and felt she was going to be sick.

After several minutes, Herring allowed Kim to get up. Then he threw her down on the bed and tore off her nightgown and began to take off his own clothes. He forced his fingers into her vagina, then forced his penis into her vagina twice, as hard as he could, saying, “You know I like this.” She screamed with pain and told him to stop. Herring continued to rape her for what seemed like an hour. He also forced his fingers into her anus and tried to force his penis into her anus, but she pushed him away with her feet when she felt him touch the opening. At no point did Herring ejaculate. Eventually, Herring “got bored” and went into the living room to smoke marijuana and consume alcohol.

Kim also told Hetrick that several weeks earlier she went to a doctor because Herring had beaten her, split her lip, and burned her with matches. She claimed Herring

had appeared at her apartment “out of the blue” and stayed for several days despite her repeated requests for him to leave. During this time, Kim claimed, Herring was drinking, smoking marijuana, snorting ground-up pills, watching pornography, and masturbating several times a day.

Kim advised Hetrick that they did not have a sexual relationship, because she had cervical cancer and intercourse was extremely painful for her.

6. Kim’s July 6 Statement to Dr. Schulkin at the Hospital

Kim was thereafter examined by Dr. Maury Schulkin, an emergency room physician at Petaluma Valley Hospital. He documented the injuries observed by the officers and paramedic. He also noted swelling on the left side of Kim’s scalp and reddening and tenderness on her right wrist. Kim advised that she had a headache and sore throat as well. Kim told Dr. Schulkin that she was punched over her left eye and in the head and face, and was choked.

According to hospital records, Kim said “he bit me.” The records also note that the “same alleged person of physical abuse had sexually abused her last night at approximately 1900.” In addition, Kim purportedly stated: “I jumped through the window to get away from him” and “[h]e also tried to smother me with a pillow.” The records also noted that Kim had said “she was assaulted by [her] ex-boyfriend.” According to Dr. Schulkin, Kim’s injuries were consistent with her report of being beaten and strangled.

7. Police Interview of Herring on July 6

Meanwhile, Herring had driven to the Rohnert Park police station, arriving around 10:00 p.m. on July 6. He had scratches on his face, neck, and arms, as well as bite marks on both thumbs, which were bleeding.

Herring was interviewed by Sergeant Donald Wagner, and a transcript of the interview was admitted into evidence. Herring claimed that Kim had started the altercation by biting his right thumb after he confronted her about where she had been for three hours. He pushed her away and fought her off. As he gathered his things, she invited him to hit her, jumped on his back, scratched him, and bit his hand. To get her to

stop biting his hand, Herring bit Kim's shoulder. Then he left her apartment and, suspecting she would claim domestic violence, went to the police station on his own. Herring denied taking drugs or ever having sexual relations with her.

Herring gave his consent for the police to enter his car. Officer Boggeri retrieved a white polo shirt, which was wet and bloody, and pajama bottoms. He also retrieved a blue bag, which Herring said contained items belonging to Kim. The bag, which the police returned to Kim's apartment later that night, contained syringes and Fentanyl patches.

Sergeant Wagner also conducted a sexual assault examination of Herring. Among other things, Wagner collected penile swabs, hair samples, and a blood sample.

8. Physical Evidence at the Scene

Officer Steven Stayrook, an evidence specialist for the Rohnert Park police, arrived at Kim's apartment around 2:45 a.m. on July 7, 2002, to process the crime scene. Human blood was found on the sheets, pillows, and a door knob in Kim's apartment. Kim's broken necklace was on the bed.

9. Kim's July 7 Tape-Recorded Interview With the Police

After Kim returned to her apartment, the police conducted a further interview at approximately 3:00 a.m. on July 7, 2002. In attendance were Sergeant Wagner, Officer Hetrick, technician Stayrook, and another officer. An audio tape of the interview was played for the jury (People's Exhibit 12) and a transcript of the interview (People's Exhibit 13) was provided to the jury as well.

In the recorded interview, in response to police questioning, Kim stated that "like a switch, I don't know how to describe it, [Herring] just grabbed me and just got crazy." He grabbed her by the forearms, she explained, and "started shaking me and saying I was lying and that I had been with some black person that lives around the neighborhood." When she denied his accusations, Herring accused her of lying. She claimed Herring told her he was "into pedophilia" and had videos and sex toys. Although she was not involved sexually with Herring due to her cervical cancer, Herring requested sex from her "all the time." In fact, Kim asserted, Herring raped her "yesterday" (apparently July 5) in

her bedroom vaginally; she screamed and cried and asked him to stop. Herring said he was going to “do it in my, in my bottom too,” Kim recalled, and she begged him not to. Before he raped her, he forced her to orally copulate him, grabbing her hair and forcing her head down. Kim tried to dial 911, but she could not see the numbers to do so. Herring punched her in the back and slapped her face, lips, and head. Kim continued her description: “So he dragged me into the bedroom and I was like grabbing on to the walls so that I wouldn’t get into the bedroom [‘]cause I wanted to get out the door you know and um, so he eventually then he pushed me on top of my bed and then he pinned me down. And he sat on my ribs and I think he held my arms down with his knees, I think, I, I, I think he did, cause I couldn’t move. [¶] . . . [¶] And then he kept slapping me and then he kept putting, I have a white pillow and he kept putting it over my face and he kept choking me and then smothering me with it and he kept saying I’m gonna kill you and I’m gonna kill your brother, I’m gonna kill you, I’m gonna kill your brother, I’m gonna kill you. And I’m gonna kill you tonight. And then I said please leave me alone, please get off me, please get off me. And then he said I’m gonna knock out all your teeth, and he just kept hitting me, um and then so I was trying to fight back cause my knees were free enough . . . [¶] . . . [¶] where I could lift my knees. But all I could kind of do is just kind of hit the back of him and I don’t know if it was doing anything or not. Um, and um I remember I saw my blood on his shirt, my blood, cause he had a white shirt on. [¶] . . . [¶] And then he kept saying that it was, that the police would never believe, they, they said that I would, I attacked him, that they would never believe that he attacked me.” Kim then explained that she used the closet door for a shield, he bit her on the shoulder, and she finally escaped by opening her window, jumping through the screen, and running away.

10. Kim’s July 7 Statement to Sexual Assault Nurse Austin

Melanie Austin, a registered nurse and sexual assault nurse-examiner, conducted a sexual assault examination of Kim in the early morning hours of July 7, 2002. The interview portion began shortly after 3:45 a.m., and the physical examination, conducted

for purposes of “evidence collection,” took place between 4:40 a.m. and 6:00 a.m. Kim appeared fearful and nervous.

During the examination, Kim described the events of July 5 and July 6. According to Austin, Kim stated she had been in a nonsexual relationship with her assailant, and the injuries evident on her body were from a physical assault on July 6. Kim also told Austin that the assailant had raped her on July 5, by holding her down, penetrating her vagina with his penis, inserting the tip of his penis and his finger in her anus, and holding her by the hair and forcing his penis into her mouth to the point she was choking. In addition, Kim disclosed that the assailant had kicked her and burned her with a cigarette about a month earlier.

Austin noted that Kim had a fresh laceration on her breast, bruising and swelling of her hymen, three reddened and irritated areas of tissue inside her vagina (near the entrance), some abrasions inside her vagina, a reddened area at the entrance of her anus, and tenderness on her posterior fourchette. Austin did not find sperm during the examination.

At trial Austin opined that the redness inside Kim’s vagina would not have been caused by a tampon, Kim’s illnesses (i.e., endometriosis and lupus), or Kim’s prior cryosurgery (freezing of the cervix six months prior to the assault). Rather, the redness was most likely associated with nonconsensual sexual intercourse. Further, Austin opined, Kim’s injuries were consistent with her account of the events of July 5 and 6.

Austin’s forensic report was admitted into evidence without objection. The report summarized the findings as follows: “Patient attacked and raped last night, then physically attacked and beaten tonight by some assailant. Exam consistent with recent physical attack. Exam consistent with history.”

11. Kim’s Death on July 8 and the Autopsy Results

On the night of July 7, Kim obtained an emergency protective order against Herring.

Around 3:00 p.m. the next day, Officer LaRae Archibald responded to a call from Kim’s apartment complex. He found Kim dead in her bathtub. Kim’s body had fallen

backwards into the bath tub, and her head was submerged into the water. A “to-do” list was found by her purse on the floor, which included getting a restraining order against Herring. An undated “final farewell” note to her mother was found in a storage box on her patio. Intravenous drug paraphernalia and Fentanyl patches were at the scene. A syringe was in her right hand, a blue rubber tourniquet was on her left thigh, and there were needle puncture marks on her legs.

Dr. George Bolduc performed an autopsy on Kim’s body. His report concluded that Kim had died by drowning and had “acute Fentanyl toxicity.” Kim had also suffered what appeared to be a fracture of a portion of cartilage in her neck, and the fracture and accompanying hemorrhage could have been the result of manual strangulation or other blunt force trauma. An abrasion on the skin was also consistent with manual strangulation. There was no evidence that Kim had brain cancer.

12. Search of July 8 and DNA Test Results

On July 8, police searched Herring’s vehicle pursuant to a warrant and seized seven pornographic video tapes. Inside Herring’s apartment, Detective Archibald found a mortar and pestle containing a residue of a cocaine-amphetamine-methamphetamine-oxycodone mixture.

DNA testing of the penile swabs taken the night of July 6 indicated that Herring’s sperm and Kim’s epithelial cells from her mouth or vagina were on Herring’s penis. Prosecution expert witness, Nicola Shea, could not account for the presence of Kim’s DNA, and believed it would have washed away upon bathing. Herring’s blood sample tested positive for marijuana.

13. Additional Prosecution Evidence

The prosecution introduced evidence that Herring and his ex-wife were in the process of divorcing in October 1996. One night he brought dinner to her house to discuss their divorce. She had a glass of wine, passed out, and awoke to Herring shaving her pubic hair without her permission. Marjorie Cusick, an expert witness, described battered women’s syndrome to the jury.

C. DEFENSE EVIDENCE

1. Herring's Testimony

Herring and Kim began dating on January 26, 2002. Kim told him that she had abdominal and ovarian cancer. Although he found her attractive and wrote her a love letter describing his "lustful state," he accepted the fact that she was unable to have sexual intercourse due to an illness and denied ever having sexual relations with her. In an e-mail to a friend, Herring disclosed he was in a new relationship with a woman who had terminal cancer and he intended to stay with and comfort her until she died.

Herring helped Kim financially, emotionally, and physically. In March 2002, when Kim said she needed money to go to Houston's M.D. Anderson Hospital for cancer treatment, he gave her \$4,600 for the trip and surgery. While she was supposedly in Houston, Kim telephoned Herring and said she had an inoperable brain tumor and less than a year to live. Herring was extremely distraught and shared this news with his friends and family.

To help Kim, Herring contacted various friends and colleagues, including an acupuncturist, nutritionist, and a hospice nurse. In addition, he bought Kim a car stereo, groceries, and other items.

Herring also took Kim to her doctor's appointments, including an April 15, 2002, appointment with Dr. Schten. During the appointment, he gave Dr. Schten a note about Kim's brain tumor because he was concerned it was affecting her mentation. Herring denied raping, burning, or beating Kim as she had told Dr. Schten on April 16.

On May 13, 2002, Herring discovered \$2,800 in charges to his credit card made to Victoria's Secret, which he later determined were made on the Internet from his computer. Kim admitted making the charges and agreed to return the items.

Kim told Herring that her family was unsupportive. She also told him at one point that her family did not want her seeing him. In June 2002, he learned from Kim and Officer Cingolani that Kim's family thought he wanted to kill them, but was unaware that Kim was the source of the misinformation. Although he was "concerned" about Kim's relationship with her mother and stepfather, he never threatened them.

When he spoke to Kim's mother on June 4, 2002, Herring learned that Kim did not have cancer and she had used his money to go on a cruise with her brother. Confused, he laid down on Kim's couch to think and awoke at midnight on June 5, 2002, to Officer Hetrick asking him to leave Kim's apartment. That evening, he tried to file a police report at the Rohnert Park Police station regarding Kim's false statement about treatment in Houston, but the police would not take the report.

Disappointed, Herring decided to visit his family and friends for a few weeks, traveling to Indiana and elsewhere. He spoke to Kim several times during the trip by telephone and wanted to continue their relationship.

Herring returned to California on about June 28, 2002, and called her on his way from the airport. She was apologetic about the events of their relationship, and he went to her apartment. He was not mad at her, but believed she was mentally ill and needed his help. Kim gave him a key to her apartment.

On July 2, 2002, Herring asked Kim if she was abusing Fentanyl. Kim denied that she was. On July 5, Kim was asleep or unconscious from about 2:00 p.m. onward. He found Kim's blue bag containing Fentanyl patches, Fentanyl prescriptions, and a rubber tourniquet, syringes, tubing and needles for intravenous injection. Herring concluded that Kim, a registered nurse, was injecting Fentanyl drawn from the patches. Afraid she would hurt herself, Herring hid the bag and called Kim's sister about it. Around 11:00 that night, Herring noticed Kim was looking for something, but they never discussed the bag or its contents. Herring then went to sleep. He denied sexually assaulting Kim on July 5.

Herring also denied Kim's account to the police of the events of July 6, 2002. About 6:00 p.m., he surmised, Kim took his credit cards without his permission, purchased \$920 worth of Fentanyl, and lied to him about going to the grocery store.⁴

⁴ Jim Strenkofsky, a pharmacist at a Rite-Aid drug store in San Rafael, remembered that Kim had a Fentanyl prescription filled on the night of July 6, 2002. She had asked for 20 patches, enough for about 60 days, but she had filled a prescription for the same

After she returned to the apartment, he asked her where the groceries were. She did not respond, but sat down on the couch beside him, put his right thumb in her mouth, smiled, and bit it. He tried to yank his hand away, and she scratched his arm. She tried to scratch his face, and he grabbed her hands and pushed her onto the sofa. He began to gather his belongings to leave. She taunted him, inviting him to hit her. As he was retrieving one of his bags, she grabbed his left hand and bit his left thumb.

Herring then wrestled with Kim, he acknowledged, but in doing so he was merely trying to get her to release his thumb from her mouth. To this end, he knocked her to the ground. He hit her in the back three times with the heel of his hand. He bit her shoulder. And at one point, he grabbed her throat for about five seconds, with “a little bit of a squeeze,” before he was able to tug his left thumb from her mouth. Herring denied strangling her, smothering her with a pillow, or threatening her or her brother.

Herring next took his belongings and the blue bag he had hidden the day before, and left. He drove to the Rohnert Park police department, where he gave the police both written and oral statements. The oral statement was tape recorded, although Herring testified that the tape offered in evidence was incomplete. The police also took photographs of Herring’s injured thumbs.

Herring claimed that the closet doors in Kim’s apartment were off their track because they were broken previously, not because of any altercation between him and Kim. He further claimed that Kim’s DNA was on his penis because she bit his thumb with her mouth on July 6, and he subsequently touched his penis when he urinated on a wall before entering the police station.

Herring denied that he snorted crushed pills, asserting that the mortar and pestle (containing the residue of a drug mixture) found in his apartment belonged to Kim. He believed that Kim laced his salmon lunch with marijuana on July 6, which is why he tested positive for marijuana. He denied that he watched pornographic tapes at Kim’s

drug too recently. He sold her ten patches for \$921.99, which she charged on Herring’s credit card.

apartment. He also denied that in October 1996 he shaved Jane Doe's pubic hair without her permission.

2. Other Defense Evidence

A number of other witnesses testified for the defense. Dr. Marvin Zwerin, an osteopathic physician, treated Kim for chronic pain related to endometriosis, migraine headaches, and lupus, and prescribed Fentanyl for her. Dr. Reiber testified that the photograph of Kim's throat structure appeared to show that Kim might have a natural joint in her larynx, which Dr. Bolduc might have mistaken for a fracture in her thyroid cartilage. According to Dr. Petracek, female batterers are self-focused, unable to empathize with their partners, have low impulse control, portray themselves as the victim, and use denial as a defense. Dr. Kim opined that, after interviewing Herring, he did not believe Herring had a propensity for violence. Herring's friends and former girlfriends denied that he was violent and believed he cared for Kim.

D. VERDICT AND SENTENCE

Herring was found guilty on counts I (rape), IV (attempted forcible sodomy), VII (assault by means of force likely to produce great bodily injury), and VIII (false imprisonment). The jury found him not guilty on counts II and III (sexual penetration), and was unable to reach a verdict on counts V (forcible oral copulation), VI (criminal threats) and IX (attempted murder).

Herring was sentenced to an aggregate term of 17 years in state prison, comprised of: four years for count VII (assault); a consecutive one-year term (one-third the midterm) on count IV (attempted forcible sodomy); a consecutive upper term of eight years for count I (rape), and a consecutive four-year term for the great bodily injury enhancement. The court stayed sentence on count VIII (false imprisonment) pursuant to section 654.

This appeal followed.

II. DISCUSSION

To resolve this appeal, we need address only the first of Herring's contentions: that the admission of certain statements violated his Sixth Amendment right to confront and cross-examined witnesses under *Crawford*.

A. ADMISSION OF HEARSAY STATEMENTS

Herring contests the admission of four sets of statements allegedly made by Kim and introduced at trial: (1) the statements testified to by Officer Boggeri, which he said were made on the night of July 6, during the officers' initial contact with Kim at her apartment; (2) the statements testified to by Officer Hetrick, which she said Kim made on the night of July 6, while awaiting treatment at the hospital; (3) Kim's tape-recorded statement to police, which she gave upon her return to her apartment around 3:00 a.m. on July 7; and (4) statements testified to by nurse Austin, which she said Kim made beginning around 3:45 a.m. on July 7 during a sexual assault examination. These statements, he contends, were admitted in violation of his Sixth Amendment right to confront and cross-examine witnesses.

1. Waiver

As a threshold matter, the People contend that Herring waived his confrontation clause challenge by not raising it at trial. Although Herring moved in limine to exclude Kim's statements on the ground the prosecutor had failed to comply with the procedural requisites of Evidence Code section 1370, and defense counsel asserted that Evidence Code section 1370 was intended to comply with constitutional guarantees, the People contend the objections were not sufficiently specific to preserve the constitutional claim. And while Herring in pro per referred to his confrontation rights in his motion for a new trial, the People claim this effort came too late.

We do not agree. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.) At the time of trial, Evidence Code section 1370 had been upheld as facially constitutional. Although Herring could have argued that Kim's statements lacked

adequate indicia of reliability for admissibility under *Ohio v. Roberts* (1980) 448 U.S. 56 (*Roberts*), the confrontation clause challenge available after *Crawford* would have been futile at the time of trial. In any event, we have discretion to consider constitutional claims even if they were not timely raised in the trial court. (See *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173.)

2. Evidentiary Basis for the Statements' Admission

As out-of-court statements offered for their truth, Kim's assertions to Boggeri, Hetrick, the officers in the recorded interview, and nurse Austin were hearsay. They were admitted at trial pursuant to Evidence Code section 1370, which provides a hearsay exception for a victim's statement to medical personnel or law enforcement that "purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant," if it was made at or near the time of the injury or threat, the victim is "unavailable" as a witness, and the statement "was made under circumstances that would indicate its trustworthiness." (Evid. Code, § 1370.)⁵

As an alternative to Evidence Code section 1370, the People argue that Kim's statements also fell within the hearsay exception for spontaneous declarations under

⁵ Evidence Code section 1370 states in pertinent part: "(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: [¶] (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness pursuant to Section 240, [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section. [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official. [¶] (b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following: [¶] (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested. [¶] (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive. [¶] (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section."

Evidence Code section 1240. If admissible under Evidence Code section 1240, confrontation clause analysis under *Crawford* might be unnecessary if we were to conclude that the hearsay exception for spontaneous declarations was established at common law. In the matter before us, however, we need not address this interplay between Evidence Code section 1240 and the confrontation clause. A spontaneous statement under Evidence Code section 1240 is one which “[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception.” The record does not demonstrate that the challenged statements were in fact “made spontaneously while [Kim] was under the stress of excitement” caused by the attack, except perhaps with respect to her initial statement to Officer Boggeri. And as to this statement, we conclude *post* that its admission did not violate the confrontation clause anyway. We therefore have no need to determine the significance of its potential admissibility under Evidence Code section 1240.

3. The Confrontation Clause

The Sixth Amendment confrontation clause provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Before *Crawford*, the admission of an unavailable witness’s statement against a criminal defendant was permissible under *Roberts, supra*, 448 U.S. at page 66, if “(1) ‘the evidence falls within a firmly rooted hearsay exception’ or (2) it contains ‘particularized guarantees of trustworthiness’ such that adversarial testing would be expected to add little, if anything, to the statements’ reliability.” (*Lilly v. Virginia* (1999) 527 U.S. 116, 124-125.)

Crawford rejected continued application of the *Roberts* rule with respect to “testimonial” hearsay. The court held that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” (*Crawford, supra*, 124 S.Ct. at p. 1374.) Thus, testimonial hearsay is admissible only if the declarant is unavailable and there has been a prior opportunity for cross-examination of the declarant. (*Ibid.*)

Because Kim died before criminal proceedings began, she was unavailable to testify at trial. There was no dispute that Herring lacked any pretrial opportunity to cross-examine her. *Crawford* therefore applies to preclude Kim’s hearsay statements, if those statements were “testimonial.”

Crawford declined to “spell out a comprehensive definition of ‘testimonial.’” (*Crawford, supra*, 124 S.Ct. at p. 1374.) The court did state that “[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” (*Ibid.*, italics added.) Although the court did not define the term “interrogation” either, it suggested the term should be construed broadly, in its “colloquial, rather than any technical legal, sense.” (*Id.* at p. 1365, fn. 4.) In *Crawford*, a declarant’s “recorded statement, knowingly given in response to structured police questioning, qualifie[d] under any conceivable definition.” (*Ibid.*)

Further examination of *Crawford* discloses that police interrogations implicate core Sixth Amendment concerns because police officers have adopted the investigative functions that were previously handled by justices of the peace in England. (*Crawford, supra*, 124 S. Ct. at pp. 1364-1365.) ‘Justices of the peace conducting examinations under the Marian statutes . . . had an essentially investigative and prosecutorial function. [Citations.] England did not have a professional police force until the 19th century [citation], so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.’ (*Id.* at p. 1365.)

Thus, under *Crawford*, statements obtained during police interrogations are testimonial fundamentally because police officers who obtain a statement during an interrogation are performing investigative and evidence-producing functions formerly handled by justices of the peace. The use of such an out-of-court statement to convict a

defendant implicates the central concerns underlying the confrontation clause. (*Crawford, supra*, 124 S.Ct. at p. 1365.)

In light of this rationale, statements obtained through police officer questioning at or near the scene of a crime would be testimonial under *Crawford* if obtained by an officer acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution. This formulation reflects *Crawford's* emphasis on purposeful conduct by government officers. (See, e.g., *Crawford, supra*, 124 S.Ct. at p. 1367, fn. 7) [“[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse”].) The production of evidence for use in a potential prosecution through purposeful questioning has greater implications for core confrontation clause concerns than questioning incidental to other law enforcement objectives, such as exigent safety, security, and medical concerns.”⁶

With this in mind, we examine each of the subject statements in their context.

4. Boggeri’s Testimony re Kim’s Statement at the Scene

Boggeri arrived at Kim’s apartment in response to a 911 call. At the scene, he observed that she was upset and had multiple injuries that had apparently been sustained recently. The area was unsecured and the situation uncertain. There is no indication in the record that the officers were aware of the nature of the crime, the identity of the assailant, whether the assailant was on or near the premises, or whether he possessed any weapons posing a danger to them or to others. When Boggeri merely asked Kim how she sustained her injuries, she responded that Herring had punched her several times and tried to suffocate her with a pillow and choke her with his hands.

⁶ The California Supreme Court has granted review in cases addressing whether statements obtained through police officer questioning in the field are testimonial. (See *People v. Kilday*, previously published at 123 Cal.App.4th 406, review granted and opinion superseded January 19, 2005 (S129567); *People v. Cage*, previously published at 120 Cal.App.4th 770, review granted and opinion superseded October 13, 2004, (S127344); *People v. Adams*, previously published at 120 Cal.App.4th 1065, review granted and opinion superseded October 13, 2004 (S127373).)

Based on the record before us, we conclude that Officer Boggeri was not producing evidence in anticipation of a potential criminal prosecution in eliciting basic facts from Kim about the nature and cause of her injuries. Because the responding officers were still principally in the process of accomplishing the preliminary tasks of securing and assessing the scene, Kim's statement to Boggeri was not testimonial.⁷

5. Hetrick's Testimony Re Kim's Statement at the Hospital

Kim's statement to Officer Hetrick was made at the hospital, while she awaited treatment. By that time, she had been removed from the crime scene, and the police had secured the area and had an opportunity to assess and resolve any other exigent matters. In addition, through Kim's statement to Boggeri, Hetrick was aware of the nature of the alleged crimes and the identity of the likely assailant. This enabled Hetrick to conduct more purposeful and focused questioning. Furthermore, Hetrick asked not just about the immediate events of July 6, but also about incidents of prior abuse by the same assailant. Through this inquiry Kim disclosed the alleged July 5 rape.

During her attempts to elicit information from Kim, Hetrick was acting in an investigatory capacity to produce evidence in anticipation of a potential criminal prosecution. Accordingly, the statement she obtained is testimonial under *Crawford* and was inadmissible absent a prior opportunity for cross-examination.

6. Recorded Statement on July 7

The tape-recorded statement, obtained by police in Kim's apartment, was obtained in circumstances similar to the interrogation involved in *Crawford*. As in that case, Kim's statements were knowingly given, recorded, and the product of structured questioning. (See *Crawford, supra*, 124 S.Ct. at p. 1365, fn. 4.) Kim's recorded statement given in her apartment was therefore testimonial hearsay. Indeed, respondent concedes this point.

⁷ The *Crawford* court did not decide whether *nontestimonial* hearsay is now altogether outside the scope of the confrontation clause or whether such hearsay continues to be subject to the *Roberts* rule. (See *Crawford, supra*, 124 S.Ct. at pp. 1370, 1374.) The parties do not raise the issue, and we need not address it.

7. Statements to Nurse Austin on July 7

Lastly, we come to Kim's statements to nurse Austin. Austin was not a police officer, but a sexual assault nurse-examiner. The obvious purpose of her questioning, however, was to produce evidence to assist the police and any subsequent prosecution.

According to Austin's testimony, a sexual assault examination "consists of an interview that is recorded on a form that is developed by the Office of Criminal Justice Planning, and goes along usually with the detectives' exam--examination and interview of the patient. And then it's a physical exam *for evidence collection.*" (Italics added.) It has, therefore, a law enforcement rather than medical purpose.

Furthermore, the examination took place *after* Kim had been examined and treated by Dr. Schulkin, and was prompted by *the police* for forensic purposes. On the forensic medical report summarizing the findings of the examination, Officer Hetrick signed the following statement: "I request a forensic medical examination for suspected sexual assault at public expense." Kim herself was advised of the evidentiary purpose of the examination, as her consent form states: "I understand that a forensic medical examination for evidence of sexual assault at public expense can, with my consent, be conducted by a health care professional to *discover and preserve evidence of the assault.* If conducted, the report of the examination and *any evidence obtained will be released to law enforcement authorities. . . .*" (Italics added.) The statements Kim made to nurse Austin, therefore, are distinguishable from statements a victim might make to medical personnel for purposes of medical diagnosis and treatment.

Moreover, by the time of the examination by Austin, the police had already questioned and arrested Herring as the assailant, questioned and conducted a recorded interview with Kim, and processed Kim's apartment as a crime scene. Under the totality of circumstances, the plain purpose of the interaction between Austin and Kim was to

gather evidence, and Kim's oral statements to nurse Austin were testimonial under *Crawford*.⁸

In sum, Kim's statement to Officer Boggeri when he arrived at the scene was not testimonial, but her statements to Officer Hetrick at the hospital, to the police during a recorded interview in her apartment, and to nurse Austin during the sexual assault examination, were testimonial. Because Herring did not have an opportunity to cross-examine Kim on these statements, their admission into evidence violated his Sixth Amendment rights under *Crawford*.

8. Harmless Error.

We next consider whether the admission of Kim's statements to Officer Hetrick and nurse Austin, as well as her recorded interview with police, constituted mere harmless error. Because the error was of constitutional dimension, we apply the rule set forth in *Chapman v. California* (1967) 386 U.S. 18. Under the *Chapman* standard, errors are harmless only if they did not contribute to the result, in that they were "unimportant in relation to everything else the [factfinder] considered on the issue in question, as revealed in the record." [Citation.]” (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

Herring was found guilty of rape, attempted forcible sodomy, assault by means of force likely to produce great bodily injury, and false imprisonment. With respect to the attempted sodomy and false imprisonment charges, there was barely any evidence besides Kim's erroneously-admitted statements. Austin's sexual examination disclosed some physical evidence of attempted sodomy, such as a reddened area at the entrance of her anus. There was, however, no evidence that Herring was the perpetrator, or any admissible statement from Kim that sodomy had in fact been attempted. Nor was there any evidence, other than Kim's inadmissible statements, of false imprisonment.

⁸ Kim's oral statements to nurse Austin were recorded in Austin's forensic report, from which Austin read at trial and which was entered into evidence. The forensic report itself may well be admissible as a business record, pursuant to Evidence Code section 1271. But Kim's hearsay statements *within* the forensic report are still testimonial and inadmissible under *Crawford*.

Therefore, the admission of Kim's statements was clearly prejudicial error as to the attempted forcible sodomy and false imprisonment convictions.

A somewhat closer question arises with respect to the charges of rape and assault by means likely to produce great bodily injury. In regard to the rape charge, the hospital records note: "same alleged person of physical abuse had sexually abused her last night at approximately 1900." This "same alleged person" was identified elsewhere in the records as Kim's ex-boyfriend. In addition, Austin noted in her forensic report that Kim was "attacked and raped last night," referring apparently to July 5. There was also physical evidence of rape gathered during the sexual assault examination: bruising and swelling of Kim's hymen, reddened and irritated tissue inside her vagina near the entrance, and abrasions on her vagina. Austin opined that the redness inside her vagina was most likely associated with nonconsensual sexual intercourse. In addition, evidence that Kim's endometriosis made intercourse painful suggests that any intercourse in which she engaged was nonconsensual. Penile swabs collected from Herring the night of July 6 (a day after the rape) indicated that his sperm and cells from Kim's mouth or vagina were on his penis. From this evidence, the jury *could* have concluded that Herring raped Kim on July 5 as charged.⁹

Similarly, there was certainly evidence from which the jury *could* have found Herring guilty of assault by means likely to produce great bodily injury. Neighbor Leavitt saw that Kim had blood on her face and heard her say she had been beaten by her boyfriend. Boggeri and Hetrick observed her bruises, lacerations, and abrasions. Kim told Boggeri that Herring punched her several times, tried to suffocate her with a pillow, and attempted to choke her. Paramedic Westrope saw that Kim's clothes were torn and she had injuries around her lips, abrasions on the side of her neck, and cuts on her knees and shoulders. She said her ex-boyfriend had hit her with his hand, grasped her neck, and

⁹ There was also evidence that Kim told Dr. Schten in April 2002 that Herring had raped her in the past. The information, however, charged that the rape occurred on July 5, 2002.

tried to strangle her. Dr. Schulkin confirmed the injuries observed by the officers and paramedic, and Kim recounted that she was punched in the head and face and was choked. Hospital records indicated Herring bit her, assaulted her, and tried to suffocate her. Photographs of Kim on July 6, showing her injuries, were shown to the jury.

Nevertheless, we cannot say that the admission of Kim's testimonial statements did not contribute to the rape and assault convictions beyond a reasonable doubt. Kim's credibility was critical to the resolution of the case, particularly since there was evidence she had not always been honest or accurate in her claims in the past. The admission of three additional reports of the disputed events, generally consistent in substance, buttressed her credibility. Furthermore, her inadmissible statements to Officer Hetrick, nurse Austin, and the officers during the recorded interview were much more detailed, vivid, and comprehensive than her shorter and less dramatic statements to the paramedic and emergency room doctor. As such, the evidence admitted in violation of *Crawford* was not merely cumulative of properly-admitted evidence. While there was significant evidence of an assault, there was less evidence of "means of force *likely to produce great bodily injury*" (§ 245, subd. (a)(1)), and what admissible evidence there was on this point may well have appeared more persuasive in light of Kim's inadmissible descriptions of the July 6 attack. Moreover, by introduction of the audiotaped interview with police, the jury actually heard Kim's voice describing the events she claimed occurred.

We are also mindful of the prosecutor's reliance on the statements in closing argument with respect to the rape and assault charges. In particular, the prosecutor told the jury that in sexual assault cases, nothing more was needed to convict the defendant than the victim's own word. And during their deliberations, the jury requested readbacks of Hetrick's and Austin's testimony. Based on the record, we cannot say the improperly-admitted evidence was "unimportant" to the jury in reaching its decision.

In the final analysis, the erroneous admission of Kim's statements to Officer Hetrick, to the officers in her recorded interview, and to nurse Austin during the sexual assault examination was not harmless beyond a reasonable doubt. We must therefore

reverse Herring's convictions. In light of this conclusion, we need not address Herring's other contentions regarding prosecutorial misconduct and sentencing error.

III. DISPOSITION

The judgment is reversed.

STEVENS, J.

We concur.

JONES, P.J.

GEMELLO, J.